COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

COMPLAINT OF CTC COMMUNICATIONS CORP. CONCERNING REFUSAL BY VERIZON MASSACHUSETTS TO PROVIDE UNBUNDLED NETWORK ELEMENTS AT TARIFFED RATES	)	DTE NO. 04-87

MOTION OF VERIZON MASSACHUSETTS FOR RECONSIDERATION

I. INTRODUCTION

Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon MA") hereby submits this Motion for Reconsideration of the Department's March 9, 2006, Order on Motion for Reconsideration ("the Order") in this proceeding. In the Order, the Department granted relief to CTC Communications Corp. ("CTC") on its complaint seeking to purchase UNE-P from Verizon MA's UNE tariff, DTE No. 17, to serve enterprise customers, including four-line carve-out customers, and seeking to prohibit Verizon MA from billing CTC any rate or surcharge not contained in that tariff. The Order must be reconsidered and vacated for at least two reasons.

First, the Department failed to conduct a proceeding that conformed with the requirements of the Massachusetts Administrative Procedures Act, specifically G.L. c. 30A, §§ 10 and 11. Instead, while the only matter before the Department was the complainant CTC's motion for reconsideration of the prior dismissal of the claim, the Department summarily disposed of the case in favor of CTC on the merits. This was error in the process by which the Department disposed of the case and violated Verizon MA's due process rights.

Second, the Department mistakenly found as fact that the interconnection agreement between the parties ("ICA") does not govern the enterprise UNE-P "replacement" services which the Department found to be at issue here. The facts as shown in the pleadings, however, demonstrate that CTC elected to purchase those replacement services as provided in the ICA and is required by the ICA to pay the applicable charges. Because the ICA governs access to those services, CTC had no right to purchase them out of a tariff or demand that they be tariffed. To the extent CTC's Complaint sought to require Verizon MA to tariff those services, the original dismissal of the claim was proper and should not have been disturbed.

II. STANDARD OF REVIEW

The Department's standard of review for reconsideration of its decisions is well-established.

> A motion for reconsideration should bring to light new previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. ...Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence.

Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, at 2 (Phase 4-A) (1997) (citations omitted). It is also appropriate where parties have not been "given notice of the issues involved and accorded a reasonable opportunity to prepare and present evidence and argument" on an issue decided by the Department. *Re: Petition of CTC Communications Corp.*, D.T.E. 98-18-A, at 2, 9 (1998).

III. ARGUMENT

Reconsideration in this case is warranted because the Department's Order was based on mistake or inadvertence, and for lack of notice and a reasonable opportunity to prepare and present evidence and argument. The Order denied Verizon MA its procedural rights based on a

limited and insufficient "record." In addition, the Order mistakenly overlooked or misinterpreted allegations in the pleadings.

A. The Order Mistakenly or Inadvertently Has Denied Verizon MA its Procedural Rights.

The Order ignores the procedural posture of the proceeding and denies Verizon MA its procedural rights by making a final determination of the merits of the case in the context of a motion by CTC to reconsider and vacate the Department's prior dismissal of the case, and in which the record before the Department consists, in its entirety, of the complaint, Verizon MA's answer, CTC's motion for reconsideration and Verizon MA's response to that motion.

In its Complaint, CTC sought an order requiring Verizon to provide CTC with UNE-P for enterprise customers pursuant to Verizon MA's UNE tariff, DTE No. 17. CTC also sought an order prohibiting Verizon MA from billing CTC a surcharge to bring the former UNE rates for such services up to Verizon MA's tariffed resale rates for analogous services, once Verizon MA ceased providing UNE-P for such customers in August of 2004. *See* Complaint, at 15. In its order of March 3, 2005, dismissing the case, the Department found that CTC's rights to the UNEs in question were defined and governed by the parties' interconnection agreement (ICA), not the UNE tariff, and that CTC' rights to such UNEs under the ICA would be arbitrated in DTE 04-33.

In the Order, the Department found that the Complaint sought not only an order regarding CTC's alleged right to purchase enterprise UNE-P out of the UNE tariff but also a determination as to "the terms under which Verizon MA provisions UNE-P replacement services" and "whether these services must be tariffed." Order at 8. Because these issues were not addressed in Docket 04-33, the Department thus deemed it appropriate to reconsider in part its dismissal order of a year earlier. *Id.* at 8, 10. The Department did not, however, merely vacate the dismissal and reinstate CTC's complaint for further proceedings. The Order goes further and purports to make a final decision on the merits of the case – by finding that the parties' ICA does not address the

replacement services allegedly at issue here, *id.* at 12, and that Verizon MA offers those replacement services at common carriage and therefore must tariff them. *Id.* at 18. This mistaken action violates Verizon MA's due process rights, the Massachusetts Administrative Procedure Act (G.L. c. 30A, §§ 10 and 11) and the Department's regulations with regard to the conduct of adjudicatory hearings (220 CMR 1.06).

It is axiomatic that in a case in which the Department is adjudicating the rights of a regulated company, that company is entitled to adequate notice and an opportunity to be heard. G.L. c. 30A, § 11(1) and (3); 220 CMR 1.06(5) and (6). In this case, Verizon MA had no notice that the Department intended to issue an order not only reinstating CTC's claims but summarily disposing of those claims as well. Accordingly, Verizon MA was allowed no opportunity to offer testimony or other evidence relevant to CTC's claims or in support of the affirmative defenses stated in Verizon's Answer. Verizon MA was inadvertently or mistakenly denied the right to present any evidence or arguments material to the final disposition of the case.

The Administrative Procedure Act outlines specific rights of parties in an adjudicatory proceeding. G.L. c. 30A, § 10 provides that in such a proceeding, "agencies shall afford all parties an opportunity for full and fair hearing." In addition, parties: (1) shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument (G.L. c. 30A, § 11(1)); (2) shall have the right to call and examine witnesses (*id.*, § 11(3)); (3) shall have the right to introduce exhibits (*id.*); (4) shall have the right to cross-examine witnesses who testify (*id.*); and (5) shall have the right to submit rebuttal evidence (*id.*). These rights are embodied in the Department's procedural regulations, which also provide for a reasonable opportunity to engage in discovery. *See e.g.*, 220 CMR 1.06. The Department's Order has mistakenly, inadvertently and unlawfully denied Verizon MA its rights to

dispute CTC's Complaint through the presentation of a complete evidentiary record upon which the Department could base a decision.

Reconsideration and re-opening of the case is also required under Department precedent. In *Re: Petition of CTC Communications Corp.*, D.T.E. 98-18-A (1998), the Department held a procedural conference at which the Hearing Officer sought a stipulation of facts and answers to briefing questions, *id.* at 1, and made statements that led Verizon reasonably to believe that the Department would first issue an order as to the scope of the proceeding before reaching the merits of the case. *Id.* at 9-10. Following submission of stipulated facts and briefs, however, the Department granted petitioner CTC's motion for expeditious relief and issued a decision on the merits of the claim. *Id.* at 2. The Department subsequently granted a motion by Verizon MA for reconsideration and ordered further proceedings in the case, based on its finding "that the Department gave to [Verizon MA] inadequate notice and opportunity to present evidence and argument before issuing a final order in the case." *Id.* In its decision, the Department first cited G.L. c. 30A, §§ 10 and 11 and then noted that, "the requirement that parties be given notice of the issue involved and accorded a reasonable opportunity to prepare and present evidence and argument must be scrupulously respected." *Id.* at 9, *citing Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board*, 9 Mass. App, Ct. 775, 783-786 (1980). The Department further held that:

> Inadequacy of notice regarding the issues involved denied [Verizon MA] the reasonable opportunity to prepare and present evidence and argument. ... [T]he Department's failure to adequately signal the parties that it would render a final decision without further proceedings did not comport with the requirements of due process."

Id. at 10.

The decision in D.T.E. 98-18-A is on all fours with the instant case. Verizon MA could not reasonably have anticipated that the Department would, on a motion to vacate a dismissal,

proceed not only to reinstate the case but also to issue a decision on the merits of the claim. As in D.T.E. 98-18-A, the Department's failure here to provide "[]adequate notice and opportunity to present evidence and argument before issuing a final order" violates Verizon MA's rights and must be remedied by further proceedings in the case.

Moreover, the rush to judgment in the Order cannot be defended on the ground that there are no facts in issue and the case is ripe for summary disposition. Administrative summary judgment procedures pass constitutional and statutory muster "only when the papers or pleadings filed conclusively show on their face that the hearing can serve no useful purpose, because a hearing could not affect the decision." *Massachusetts Outdoor Advertising Council, supra,* 9 Mass. App, Ct. at 786. That is not the case here. If Verizon MA were given the opportunity, it would offer material evidence on critical factual issues which would likely result in a substantially different outcome on the merits.

First, Verizon MA would offer evidence that, subsequent to filing their motion papers in this case, CTC and Verizon entered into an individually negotiated commercial agreement governing the terms and conditions on which Verizon MA would provide post-UNE platform services to CTC, rendering this case moot.

Second, Verizon MA would offer evidence that as of today, only four CLECs take enterprise UNE-P "replacement" services from Verizon MA and are assessed the surcharge. Accordingly, and contrary to the Department's assumptions in the Order based on statements of intent made by Verizon more than a year ago, Verizon MA does not in fact make these services available to all CLECs who might wish to purchase them but only to the select few CLECs that: (1) leased enterprise UNE-P services from Verizon MA as of August of 2004; (2) failed to convert those services to resale; (3) did not enter into a commercial agreement with Verizon MA

covering those services; and (4) continue to use those facilities today.[1] On these facts, Verizon MA cannot be found to "hold[] [it]self out to serve indifferently all potential users" with respect to these services, *Triennial Review Order*, ¶ 152, *quoting National Ass'n of Regulatory Util. Commrs. v. FCC*, 533 F.2d 601, 608-609 (D.C. Cir. 1976), and the services cannot be found to constitute "common carriage" under any reasonable reading of the term. Moreover, Verizon MA and these carriers are working cooperatively to migrate the few remaining surcharged replacement arrangements to resale or alternative services in the near future. Because Verizon MA will no longer make the replacement services available at resale equivalent rates, there is no reason to tariff those rates.

B. The Order Mistakenly Found That The ICA Does Not Govern The Replacement Services.

In evaluating whether the ICA governs the provision of replacement services here, the Order noted that under § 1.5 of the UNE Remand Attachment, "Verizon may terminate its provision of delisted UNE arrangements, and, if so, CTC *may elect to purchase* UNE replacement services if offered by Verizon." Order at 12 (emphasis added). The Order went on to find that the ICA does not require that Verizon MA offer such replacement services or that CTC to purchase them, nor does the ICA reference Verizon MA "imposing a default surcharge if CTC fails to order UNE replacement services from Verizon." The Order then concludes that the "ICA does not address the [replacement] services which Verizon has been providing to CTC and CTC has been receiving since August 23, 2004." *Id.* at 12. This finding is mistaken, in light of the facts pled in the Complaint.

Although the ICA does not *require* Verizon to offer replacement services or CTC to purchase them, if Verizon does offer such services and if CTC "elects to purchase" them, then

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[1] Further, the services at issue were made available to these CLECs only to replace embedded base UNE-P arrangements and were not available to be ordered as new service.

Section 1.5 of the UNE Remand Attachment requires CTC to pay "all applicable charges for such services." It is undisputed that Verizon notified CTC by letters dated May 18, 2004 that it would terminate unbundled access to enterprise switching as of August 22, 2004. *See* Complaint ¶¶ 8, 10; Exhibits 1, 3. Verizon offered to provide the replacement services at resale equivalent rates for those discontinued UNEs that CTC failed to migrate to resale, migrate to another alternative service or terminate. Complaint Exhibits 1, 3. It is also undisputed that CTC "elect[ed] to purchase" the replacement services offered by Verizon. CTC admits in ¶ 18 of the Complaint that, "CTC ***continues to purchase*** from Verizon various network element combinations serving customers with four or more lines, and therefore that are subject to Verizon's threatened surcharge effective August 22, 2004." (Emphasis added.)[2] In addition, CTC failed to take any of the actions that Verizon specifically stated would signal rejection of Verizon's offer, and thereby elected to purchase the replacement services at the offered rates.

Consequences flow from CTC's election to purchase Verizon MA's replacement services. The finding in the Order that the ICA does not govern those services is mistaken, as it is inconsistent with the allegations in the Complaint. Because the ICA addresses access to the services at issue, CTC has no right to purchase those services out of a tariff, *see* Order at 9, and thus no right to insist that they be tariffed. The Order's directive to Verizon to file a tariff for these surcharges is thus infirm and should be withdrawn. Finally, the ICA requires CTC to pay "all applicable charges for such services." According to the offers made by Verizon MA in May of 2004 and accepted by CTC, this includes the disputed surcharges.

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[2] In addition, as noted above, the Department found that "Verizon has been providing [the replacement services] to CTC "and CTC has been receiving [them] since August 23, 2004." Order at 12.

IV. CONCLUSION

For the above reasons, the Department should reconsider and vacate the Order on Motion for Reconsideration and schedule this case for further proceedings.

Respectfully submitted,

VERIZON MASSACHUSETTS

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